In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 93

JACK GALTER, DORA M. GALTER, WILLIAM R. GALTER AND ARNOLD F. SHAPIRO, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 203) is reported at 186 F. 2d 810.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1951 (R. 215) and the petition for a writ of certiorari was filed on June 2, 1951.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission abused its discretion in ordering petitioners to cease and desist from an unfair trade practice which had been discontinued, in part, prior to the entry of the order and, in part, prior to the filing of the complaint.

2. Whether petitioners were deprived of a fair hearing.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve

upon such person, partnership, or corporation a complaint stating its charges in that respect * * * * * * *

STATEMENT

In February 1941 the Federal Trade Commission issued a complaint under Section 5 of the Federal Trade Commission Act charging petitioners and certain corporations which they controlled with engaging in unfair practices in promoting the sale of various items of novelty merchandise manufactured by them. The proceeding was consolidated for hearing with a similar proceeding in which the respondents were jobbers who purchased for resale products manufactured by petitioners (R. 203).[1]

In February 1942 petitioners and counsel for the Commission entered into a stipulation providing that, subject to the approval of the Commission, it might decide the proceedings on the facts therein stipulated and the evidence already taken (R. 47-48). In 1947 the Commission, after approving this stipulation (R. 56), entered findings of fact based thereon and on the evidence taken prior to the stipulation (R. 152-157, 204), and entered a cease and desist order prohibiting a number of practices which the Commission found to be in violation of the Federal Trade Commission Act (R. 158-162).

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[1] This proceeding was ultimately dismissed upon the ground that the respondents therein, being jobbers only, had not been parties to the unfair practices charged against them. Order of August 15, 1947, entered in F.T.C. Docket No. 4457.

On petition to the court below for review of the Commission's order, the only provisions of the order which were in issue were those which prohibited petitioners from selling merchandise under the names "Elgin," "Remington" or "Underwood" (R. 204). The stipulated facts pertinent to this prohibition include the following: Petitioners have sold electric shavers and cameras under the brand names "Elgin" and "Underwood" (R. 50). At the request of a customer, petitioners have placed the brand name "Remington" on cameras manufactured for it, knowing that the cameras were to be sold in interstate commerce (*ibid.*). Use of these names has caused members of the public to believe that petitioners' products are those of well known and well established firms, and has induced purchase of petitioners' products in this mistaken impression (R. 55). The period during which petitioners sold or delivered products under the names in question is not set forth, except that it is stated that the name "Elgin" was used during a three-months period in 1939 (R. 50). Petitioners presently assert (Pet. 4) that they discontinued use of the name "Remington" prior to the filing of the Commission's complaint.[2]

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[2] There is no support in the record for the assertion, apart from the statement to this effect made in a petition filed by petitioners requesting the Commission to set aside its cease and desist order, *i.e.*, requesting rehearing (R. 162, 164). The petition also stated that petitioners, since entering into the stipulation as to the facts in February 1942, had not used the name "Elgin" or the name "Underwood" (R. 163-164).

The court below, in an opinion by Judge Lindley, unanimously affirmed the provisions of the Commission's order which were in issue, against the contentions now being pressed by petitioners, namely, (1) that it was an abuse of discretion to issue a cease and desist order against practices discontinued either before the filing of the Commission's complaint or, in any event, some years before entry of the order, and (2) that petitioners did not receive a fair hearing because not given "notice" of the hearings in the consolidated case, which were held after the stipulation signed by petitioners in February 1942, and because the trial examiner failed to advise petitioners of evidence, allegedly favorable to them, adduced at these consolidated hearings (R. 203-208, 211).[3]

ARGUMENT

1. The court of appeals correctly concluded that in the circumstances here the Commission did not abuse its discretion in ordering petitioners to cease and desist from use of the names "Remington," "Elgin" and "Underwood". The court assumed *arguendo,* in petitioners' favor, that use of one of these names had been discontinued prior to the filing of the complaint and that use of the other two

Petitioners assume (Pet. 12) that their statements, not having been controverted in a counter "pleading" by counsel for the Commission, are to be deemed admitted.

[3] The evidence referred to indicates that others besides petitioners have used the trade names involved. Petitioners contend that this evidence indicates that, contrary to the facts which they had stipulated, the public probably would not be misled by petitioners' use of the names (Pet. 21).

names had been discontinued from the time that the stipulation as to the facts had been entered into (R. 206). As the court stated (*ibid.*): "Under these circumstances, the commission was fully justified in believing that the claimed cessation of wrongful action was not voluntary but brought about by the commission's proceeding and that, in view of petitioners' continued insistence, that they might use each of the three names and the absence of any assertion or proof of intent not to renew their use and of any promise so to do, it was in the public interest to enjoin such use."

The Federal Trade Commission's jurisdiction is not confined to persons currently engaged in unfair trade practices. It also has authority to issue a cease and desist order against one who "has been" so engaged (Federal Trade Commission Act, Section 5, *supra*, p. 2). See *Bunte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996, 997-998 (C.A. 7). It is well settled that abandonment of an unfair trade practice or unfair method of competition is not a bar to issuance by the Commission of a cease and desist order.[4]

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[4] *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211, 220 (C.A. 7), affirmed, 324 U.S. 726; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 330-331 (C.A. 7), certiorari denied, 323 U.S. 730; *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971-972 (C.A. 3); *National Silver Co.* v. *Federal Trade Commission*, 88 F. 2d 425, 428 (C.A. 2); *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910, 913 (C.A. 7), certiorari denied, 299 U.S. 590; *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. 2d 684, 686-687 (C.A. 7); *Arkansas Whole-*

The cases cited by petitioner do not reveal a conflict with any decision of this Court or among the circuits. *United States* v. *United States Steel Corp.*, 251 U.S. 417, which involved the principles to be applied in a Sherman Act proceeding seeking dissolution of a corporation by reason of its alleged violation of that Act, is plainly not in point with respect to the scope, or the proper exercise of, the powers vested in the Federal Trade Commission.[5] The two Federal Trade Commission cases cited by petitioners are likewise readily distinguishable. In *John C. Winston Co.* v. *Federal Trade Commission*, 3 F. 2d 961 (C.A. 3), the party proceeded against had stipulated that it would never resume the challenged practice. As the court below noted (R. 206), petitioners have at no time agreed not to use the trade names here involved. On the contrary, they have continued to assert their right to do so.[6] And compare *Hershey Chocolate Corp.* v. *Federal Trade Com-*

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sale Grocers' Ass'n. v. *Federal Trade Commission*, 18 F. 2d 866, 871 (C.A. 8), certiorari denied, 275 U.S. 533; *Fox Film Corporation* v. *Federal Trade Commission*, 296 Fed. 353, 357 (C.A. 2).

[5] In that case the practices complained of were abandoned prior to suit "from a conviction of their futility," not "in prophecy of or dread of suit" (251 U.S. at 445). Here the Commission and the court below were fully warranted in guarding against the possibility that, once the threat of these proceedings was removed, petitioners would resume their unlawful activities.

[6] Petitioners dispute the statement of the court below that they have continued to claim the right to use the trade names (Pet. 12). But petitioners complain (Pet. 21) of the Commission's failure to consider certain evidence (introduced in a collateral proceeding) tending to show that the trade names

mission, 121 F. 2d 968, 971-972 (C.A. 3), a more recent case in the same circuit. In *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 F. 2d 113 (C.A. 6), upon which petitioners also rely (Pet. 17), the court set aside a cease and desist order "as to practices long discontinued, and as to which there is no reason to apprehend renewal" (79 F. 2d at 116). In the present case the Commission and the court below were rightly persuaded that there was reason to apprehend renewal of the improper use of the trade names. Even a casual perusal of the stipulation as to the facts (R. 47-56) reveals a pronounced disposition on the part of the present petitioners to employ unfair and deceptive trade practices.

If petitioners are in good faith in asserting that they now "have no intention whatsoever of resuming" the use of the trade names here involved (Pet. 12), it is difficult to see what injury they will suffer from the proscription which they are presently contesting. On the other hand, it is obvious that the public interest will be seriously prejudiced if this proscription can be avoided merely by discontinuing the unfair trade practices during the pendency of the Commission proceedings.

2. We submit that petitioners' contention that they have been deprived of a fair hearing is frivo-

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involved are in common use; in other words, that petitioners have a right to use these names.

For the effect of a continuing claim of right to engage in the prohibited practice, see *National Silver Co.* v. *Federal Trade Commission,* 88 F. 2d 425, 428 (C.A. 2).

lous. Petitioners in effect assert (1) that they did not participate in the subsequent hearings because, in reliance on the stipulation, they believed that the Commission would decide their case on the stipulated facts and the evidence already introduced; and (2) that the Commission, by doing precisely this, deprived them of a fair hearing. Petitioners, having agreed that the Commission could dispose of the charges against them on the basis of the stipulation and the evidence thus far adduced, can scarcely be heard to complain because the Commission did so.[7]

Even if it be assumed that petitioners should be given the benefit of any favorable evidence adduced at the subsequent hearings in the consolidated proceeding, that evidence does not disprove any essential stipulated fact. The additional evidence relates exclusively to the use of the trade names by others. If, as the stipulation establishes, the public was deceived by petitioners' use of the trade names, the fact that others may have used these names, and thereby deceived members of the public, would not legalize petitioner's conduct. As the court below pointed out, "this is not an action for trademark violation but a proceeding to protect the public against fraud and deception" (R. 208).

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[7] Nor can petitioners seriously assert that they were not notified of the subsequent hearings (Pet. 7, 9, 20) when they admit that the hearings had been "scheduled" and that they deliberately failed to participate in them (Pet. 21).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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